

Hickman Harbor Service, a Division of Flowers Transportation Company and National Maritime Union of America, AFL-CIO. Case 9-CA-18643

March 10, 1983

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

Upon a charge filed on August 20, 1982, by National Maritime Union of America, AFL-CIO, herein called the Union, and duly served on Hickman Harbor Service, a Division of Flowers Transportation Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on August 31, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 5, 1982, following a Board election in Case 9-RC-13875, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about May 7, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 9, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 20, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 23, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits the Union's request and its refusal to bargain, but in substance attacks the validity of the Union's certification on the basis of its objections to the election in the underlying representation proceeding. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

A review of the record, including the record in Case 9-RC-13875, discloses that, on October 16, 1981, pursuant to a Decision and Direction of Election by the Regional Director, an election was held among the employees in the unit found appropriate. The tally of ballots shows that, of approximately 25 eligible voters, 14 cast valid ballots in favor of, and 13 against, the Union, there were no challenged ballots. On October 22, 1981, Respondent filed timely objections to the election. Following an investigation, the Regional Director, on November 20, issued a "Supplemental Decision, Order Directing Hearing, and Notice of Hearing," in which he overruled Respondent's Objection 3 and that portion of Objection 2 relating to statements and conduct attributed to supporters of the Union, but ordered that a hearing be held on Objection 1, involving alleged misrepresentations of fact, and another portion of Objection 2 relating to statements of physical violence allegedly made in the presence of a representative of the Union. Thereafter, Respondent filed a timely request for review. On January 11, 1982, the Board, by telegraphic order, granted Respondent's request for review with respect to that portion of Respondent's Objection 2 relating to statements and conduct attributed to supporters of the Union, and ordered that these issues be consolidated for hearing with those raised by Objection 1, and the other portion of Objection 2 which the Regional Director ordered be set for hearing (Member Jenkins, dissenting, would have denied review). After the hearing, the Hearing Officer issued his report, in which he recommended that Respondent's Objections 1 and 2 be overruled, and that a Certification of Representative be issued in favor of the Union. On May 5, 1982, the Regional Director issued his Second Supplemental Decision and Certification of Representative, in which

¹ Official notice is taken of the record in the representation proceeding, Case 9-RC-13875, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

he adopted the Hearing Officer's report and certified the Union as the collective-bargaining representative of the employees in the unit found appropriate. Subsequently, Respondent filed a timely request for review. On July 14, 1982, the Board denied Respondent's request for review (Member Hunter, dissenting, would have granted review with respect to Respondent's Objection 2, and would have set aside the election).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.

The Board recently announced in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), a reformulation of the Board's policy concerning election campaign misrepresentations to the approach enunciated in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), overruling *General Knit of California, Inc.*, 239 NLRB 619 (1978), and thereby *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). The Board in *Midland National* determined that it will no longer probe into the truth or falsity of the parties' campaign statements, and that it will not set elections aside on the basis of misleading campaign statements. The Board will not set aside elections on the basis of substance, but will look to the deceptive manner in which the misrepresentation was made.

Respondent's objections in the underlying representation case were decided under *General Knit*. Absent special circumstances, the Board has traditionally applied the pronouncement of a new rule of law to the case in which it arose and to all pending cases.³ We shall, therefore, apply the rule of law expressed in *Midland National* to the present case.⁴

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

³ See, e.g., *Thomas E. Gates & Sons, Inc.*, 229 NLRB 705 (1977) (applying *Shopping Kart*); *H. & F. Binch Co.*, 188 NLRB 720 (1971) (applying the principles of *The Laidlaw Corporation*, 171 NLRB 1366 (1968)), *enfd.* 456 F.2d 357 (2d Cir. 1972); *Deluxe Metal Furniture Company*, 121 NLRB 995, 1006 (1958); *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990, 994 (1958). Cf. *Excelsior Underwear Inc.*, 156 NLRB 1236, fn. 5 (1966).

⁴ Member Jenkins adheres to the rule set forth in *General Knit* for the reasons given in his dissent in *Midland National*.

In these circumstances, we therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Mississippi corporation, is engaged in the operation of harbor fleet services, and maintains an office and place of business in Hickman, Kentucky. During the 12-month period preceding issuance of the complaint, a representative period, Respondent purchased and received at its Hickman, Kentucky, facility goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All deckhands, mates, welders, welders' helpers and mechanics employed by Respondent at its Hickman, Kentucky operations, excluding all master/pilots, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

2. The certification

On October 16, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 5, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about May 7, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 7, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 7, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*,

136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Hickman Harbor Service, a Division of Flowers Transportation Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All deckhands, mates, welders, welders' helpers and mechanics employed by Respondent at its Hickman, Kentucky operations, excluding all master/pilots, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 5, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 7, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hickman Harbor Service, a Division of Flowers Transportation Company, Hickman, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with National Maritime Union of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All deckhands, mates, welders, welders' helpers and mechanics employed by Respondent at its Hickman, Kentucky operations, excluding all master/pilots, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Hickman, Kentucky, facility copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER HUNTER, dissenting:

I would not grant the Motion for Summary Judgment inasmuch as I stated in the telegram, dated July 14, 1982, wherein the Board denied Respondent's request for review of the Regional Director's Second Supplemental Decision and Certification of Representation, that I would have granted review with respect to Respondent's Objection 2 and set aside the election.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with National Maritime Union of America, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All deckhands, mates, welders, welders' helpers and mechanics employed by us at our Hickman, Kentucky operations, excluding all master/pilots, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

**HICKMAN HARBOR SERVICE, A DIVI-
SION OF FLOWERS TRANSPORTATION
COMPANY**